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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Second Application by BellSouth	)	
Corporation, BellSouth Telecommunications, Inc.	)	CC Docket No. 98-121
And BellSouth Long Distance, Inc., for	)	
Provision of In-Region, InterLATA Services	)	
In Louisiana	)	

COMMENTS OF e.spire COMMUNICATIONS, INC.

Public Version

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SUMMARY

BellSouth continues to recycle its inadequate requests for in-region long distance authority in the apparent hope that the Commission will tire of turning them down. This proceeding involves the third attempt – a second try in Louisiana alone – to seek approval under Section 271. But while BellSouth is anxious to recycle its application, it has done little to address the deficiencies which caused the FCC to deny its earlier efforts. Simply put, while BellSouth is eager to accept the "carrot" of long distance authority offered by Section 271, it continues steadfastly to refuse to accept the "stick" of Section 271 by opening its local markets to effective competition.

As with its prior failed efforts, BellSouth's instant application must be denied outright as being ineligible for the "Track A" entry for which it has applied, because there has been no showing of a meaningful level of facilities-based completion for residential customers. BellSouth's reliance on resale orders is inconsistent with the Act's clear requirement that competition be facilities-based to qualify for Track A treatment. Its half-hearted attempt to identify a handful of residential customers served with competitive landline facilities is an approach which the Commission rejected in the *SBC Oklahoma* proceeding. BellSouth's attempt to rely on PCS service as a source of facilities-based competition was rejected in BellSouth's first *Louisiana* application, and the company's attempt to show that some PCS customers may have elected not to order additional landline services is insufficient to overcome prior Commission findings that PCS is not yet an effective substitute for landline exchange services.

Critically, it is BellSouth's own actions which are forestalling the development of the facilities-based competition for residential customers in Louisiana which is required for Track A entry. e.spire has constructed three alternative local exchange networks in Louisiana (New

Orleans, Baton Rouge and Shreveport) and uses those facilities today to serve hundreds of business customers in the state. However, BellSouth has established exorbitant pricing for access to its UNEs, which effectively creates a barrier to serving residential customers there. By convincing the LPSC to accept non-cost-based UNE rates, a matter which is being challenged in U.S. District Court, BellSouth has created a cost-price squeeze in which the wholesale cost to CLECs of essential BellSouth facilities required to serve residential customers far exceeds the retail rates charged by BellSouth to residential end users. This anticompetitive BellSouth pricing strategy simply has rendered the provision of competitive, facilities-based residential services in Louisiana uneconomic.

Even if BellSouth were eligible for Track A entry, its renewed application would have to be denied because the company still does not comply with Section 271's competitive checklist. Among other things, BellSouth still has not figured out how to provision interconnection, unbundled loops and number portability seamlessly; refuses to pay reciprocal compensation to competitors for the transport and termination of local traffic; has not remedied myriad deficiencies in its OSS; and will not implement performance measurements proposed by the Commission.

e.spire submits that the FCC should send a clear message to BellSouth that the simple reiteration of a premature application will not succeed. BellSouth must forthrightly address the fundamental problems underlying the denial of its two previous Section 271 applications if it hopes to provide in-region long distance services. It can do that by helping to create the conditions required for effective local competition, rather than continuing its efforts to thwart competitive entry.

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COMMENTS OF e.spire COMMUNICATIONS, INC.

e.spire Communications, Inc. and its Louisiana operating subsidiaries (collectively, "e.spire"),[1] by their attorneys, respectfully submit these comments in opposition to the Second Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. (collectively, "BellSouth")[2] for authority to provide in-region interLATA services in Louisiana pursuant to Section 271 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act"). As e.spire explains below, BellSouth's Application remains grossly premature and must be denied.

Introduction

e.spire is a facilities-based competitive local exchange carrier ("CLEC") in three Louisiana markets and in numerous other markets in eight of the nine states that comprise BellSouth's monopoly local exchange service territory. In Louisiana, e.spire has built three

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1 e.spire is the new corporate name for the company formerly known as American Communications Services, Inc. or ACSI.

2 Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region InterLATA Services in Louisiana, CC Docket No. 98-121 (filed July 9, 1998) [hereinafter "BellSouth Brief"].

state-of-the-art SONET ring networks and has virtual collocation arrangements in place in three BellSouth end offices. Three physical collocation orders remain to be fulfilled by BellSouth. In New Orleans, e.spire has installed a Lucent Technologies 5ESS switch and has begun providing competitive local exchange services through the use of its own facilities in combination with unbundled local loops ("loops" or "ULLs"). In each of its Louisiana markets, e.spire supplements its facilities-based service offerings through the resale of BellSouth's wholesale services.

Accordingly, e.spire is keenly interested in competing with BellSouth in Louisiana *today*. To make sure such competition is possible, e.spire has negotiated for interconnection, unbundling, resale and collocation with BellSouth and has participated in numerous local competition proceedings before the Louisiana Public Service Commission ("LPSC") and the Federal Communications Commission ("FCC" or "Commission"). Because BellSouth has created and maintains numerous barriers to the widespread facilities-based local competition contemplated by the 1996 Act, e.spire files these comments in opposition to BellSouth's latest Section 271 application.

Six months ago, this Commission rejected BellSouth's first bid for interLATA authority in Louisiana. Stated simply, the Commission found that (1) BellSouth's reliance on PCS providers was insufficient to satisfy Track A, (2) BellSouth's operations support systems ("OSS") were so deficient that a separate analysis of each checklist item was unnecessary, and (3) BellSouth's refusal to resell contract service arrangements ("CSAs") was unlawful. To be sure, BellSouth's instant application partially addresses each of these points. e.spire commends the Commission for encouraging and BellSouth for agreeing to several measures that should open the door to competition a little wider in Louisiana.

However, before BellSouth can be rewarded with interLATA authority, it must finish dismantling *all* of the barriers it has erected and it actually must open its network in *each* of the ways contemplated by the 1996 Act. The fact remains that BellSouth has come only part way in solving the Track A, OSS and resale deficiencies cited by the Commission in its first Louisiana Section 271 Order. Additionally, BellSouth has done little to address other checklist performance deficiencies, as well as the unlawful pricing, and practices which delay local competition practices cited by e.spire (then ACSI) in its opposition to the First BellSouth Louisiana Application. BellSouth's retention of greater than 99 percent of the Louisiana local exchange market is perhaps the starkest indicator of the work that remains to be done in opening the Louisiana local exchange market fully and irreversibly to competition.

Indeed, BellSouth has been so successful in restraining local competition in Louisiana that its 49,000-page application falls well short of demonstrating compliance with the Track A, competitive checklist, and public interest standards of Section 271. With regard to Track A, BellSouth's additional reliance on six wireline competitors, including e.spire, cannot mask the fact that residential customers still do not have a facilities-based alternative to BellSouth's local exchange monopoly. It also remains the case that PCS has not developed into a competitive substitute for wireline local exchange service in Louisiana.

Without prodding from the Commission, it seems unlikely that more than a *de minimis* number of Louisiana residential customers will realize a choice in local service providers any time soon. BellSouth's pricing for interconnection and unbundled network elements ("UNEs") must be decreased to a range that is realistically cost-based – consistent with other cost-based pricing across the country – if local competition is to succeed in Louisiana. In its comments in opposition to BellSouth's First Louisiana Section 271 Application, e.spire warned that these

prices would significantly delay the advent of facilities-based competition for residential customers. BellSouth's proud assertion that it has ported *one* residential number in the entire state only confirms that the residential cost-price squeeze forewarned of by e.spire is not just a theory but a reality.

While e.spire realizes that the Commission, at this time, may not be able to mandate that BellSouth establish forward-looking and geographically deaveraged cost-based rates, in the absence of such rates, it clearly cannot conclude that BellSouth has demonstrated compliance with the competitive checklist. Simply put, the first two items of the checklist require compliance with the cost-based pricing standard of Section 252(d)(1). BellSouth's Application does not demonstrate such compliance.

BellSouth's Application does no better in demonstrating compliance with many other aspects of the competitive checklist. BellSouth continues to rely on an unworkable patchwork of interfaces that do not provide all of the functionalities necessary to achieve nondiscriminatory access to OSS. It refuses to combine cost-based loops and cost-based transport in an attempt to force competitors into expensive collocation arrangements which it has demonstrated only the most limited capability of providing. It remains unable to overcome chronic loop cutover and number portability failures that are anything but "isolated". It refuses to pay reciprocal compensation for local traffic terminated on CLECs' networks. It unilaterally strikes most favored nation clauses, reciprocal compensation agreements and loop cut-over intervals from LPSC-approved interconnection agreements. And, just in time for this application, it has agreed to subject itself to a set of performance measurements that, in addition to being merely interim in nature, fail to provide for meaningful comparisons with respect to BellSouth's performance for competitors and its own retail operations.

BellSouth's version of the public interest analysis also misses the mark. Relying on the numbing effect of repetition, BellSouth continues to aver that the public interest test should focus on alleged benefits consumers would reap from its promise to offer a discount of five percent off AT&T's *basic rates* and from what then would be its new-found monopoly in one stop-shopping. Knowing full well that the Commission already has rejected this argument. BellSouth also suggests that its entry into long distance will spur the big IXCs to enter into Louisiana's local exchange market. This argument, too, is nothing more than a distraction. e.spire and other facilities-based carriers have invested heavily in Louisiana. Thus, it is not from any lack of interest on the part of competitors that the Louisiana market has not been opened fully to competition. Rather, it is BellSouth that is delaying competition by refusing to trade its monopoly and open its local markets in exchange for a hand in the interLATA and one-stop shopping markets.

Section 271 is clear. Until BellSouth begins to compete fairly and opens its monopoly-built network in a way that enables local competition to become firmly and irreversibly established in Louisiana, BellSouth may not reenter the long distance market. Because BellSouth refuses to open its network and compete fairly, its Second Louisiana Section 271 Application must be denied.

I. BELLSOUTH REMAINS UNABLE TO DEMONSTRATE ELIGIBILITY FOR TRACK A ENTRY

In seeking Section 271 approval, a Bell operating company ("BOC"), must identify and demonstrate compliance with the "track" – "Track A" or "Track B" – under which it contends it can proceed. Here, BellSouth claims that it has met the requirements of Section 271(c)(1)(A) or Track A. To satisfy Track A, a BOC must demonstrate that it faces actual competition from facilities-based competitors for *both* business and residential subscribers. As e.spire demonstrates below, BellSouth has not met this burden with respect to either business or residential subscribers. Residential customers still have no facilities-based alternative to BellSouth in Louisiana. Moreover, despite BellSouth's claims to the contrary, PCS has not developed into a competitive alternative to BellSouth's local services.

A. Residential Customers Still Do Not Have a Facilities-Based Alternative to BellSouth

e.spire is among the six wireline CLECs upon which BellSouth relies to demonstrate compliance with Track A.[3] Although e.spire does not dispute its status as a facilities-based provider of competitive local exchange services to business customers, it remains the case that e.spire does not offer facilities-based services to residential customers in Louisiana. As e.spire has explained previously, simple economic realities make the business market the most likely point of entry for competitors who accept the task of challenging a BOC monopoly. As discussed further below, the current economic reality in Louisiana remains such that BellSouth's

[3] BellSouth Brief at 4-6.

unbundled local loop ("ULL") pricing practices make facilities-based entry into the residential market economically infeasible.

Indeed, the only facilities-based residential services cited by BellSouth are the services it alleges KMC is providing to a *very* "small number" of residential Louisiana customers (**[confidential information: REDACTED]**).[4] The trifling nature of this claim is underscored by BellSouth's own admission that it has ported only *one* residential line in the entire State of Louisiana.[5] Even taking BellSouth's figures as accurate, e.spire submits that this level of facilities-based residential competition is *de minimis* and cannot satisfy Track A; and, if anything, it proves that the Louisiana residential markets are closed to competition at this time.[6]

This conclusion is supported by the Commission's previous discussions on what it means to be a "competing provider" under Track A. In fact, the Commission already has determined that "the use of the term 'competing provider[ ]' in section 271(c)(1)(A) suggests that there must be an actual commercial alternative to the BOC."[7] Moreover, the Commission also has recognized that "there may be situations where a new entrant may have a commercial presence that is so small that the new entrant cannot be said to be an actual commercial alternative to the

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4 BellSouth Brief at 5; Wright Conf. Ex. C; Wright Conf. Aff. ¶ 118.

5 BellSouth Brief at 57.

6 e.spire respectfully submits that the Commission may have before it facts that are analogous or even indistinguishable from those presented in SBC's Oklahoma application. *See In the Matter of Application by SBC Communications, Inc. Pursuant to Section 271 of the Telecommunications Act of 1934, as amended, to Provide In-Region InterLATA Services in Oklahoma,* 12 FCC Rcd 8685 (1997), ¶ 17 (concluding that Brooks Fiber's 4 residential test lines could not be relied upon to satisfy Track A) [hereinafter *"SBC Oklahoma Order"*], *affirmed, SBC Communications v. FCC,* 1998 WL 121492 (D.C. Cir. 1998). The exceedingly small number of customers involved and (confidential) figures regarding the number of residential lines ported to (**[confidential information: REDACTED]**) and ULLs ordered by (**[confidential information: REDACTED]**) KMC suggests that lines at issue may not be ordinary residential lines.

7 *SBC Oklahoma Order* ¶ 14.

BOC, and therefore, not a 'competing provider.'"[8] Certainly, even if BellSouth's claims are verified such a miniscule number of residential customers served over a competitor's facilities does not compel the conclusion that Louisiana's residential customers have an actual commercial alternative to BellSouth.

Recognizing the *de minimis* nature of its claim regarding residential competition in Louisiana, BellSouth offers several theories designed to get it around the Track A statutory hurdle. None of them can be defended. *First,* BellSouth claims that it can make the required Track A showing that competing providers are providing local services to business and residential customers "predominantly" or "exclusively" through the use of their own facilities *even if* no Track A carrier is providing facilities-based service to residential customers.[9] There is, however, no statutory basis for BellSouth's assertion that "Track A does not require that both [residential and business] subscribers be served on a facilities basis."[10]

To the contrary, Track A requires the presence of "one or more unaffiliated competing providers of telephone exchange service . . . to residential and business subscribers" and adds that "such telephone exchange service must be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of telecommunications services of another carrier."[11] Thus, the statute requires the presence of at least *one carrier that*

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8 *In the Matter Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd 20543 (1997), ¶ 77 [hereinafter *"Ameritech Michigan Order"*].

9 BellSouth Brief at 7.

10 *Id.*

11 47 U.S.C. § 271(c)(1)(A).

provides local exchange service to both business and residential customers through the exclusive use of its own facilities or by predominantly using its own facilities in combination with resale. There is nothing in the language of Section 271(c)(1)(A) that suggests that it can be satisfied by the presence of a competitor that relies on resale – either exclusively or predominantly – to serve an entire class of customers. To the extent that there is any degree of ambiguity in the language of that section, e.spire submits that BellSouth's erroneous interpretation of the statute must be rejected based on the fact that Congress intended for the benefits of facilities-based competition to accrue to both business and residential customers. If BellSouth is allowed to proceed on the basis that there are resellers offering competitive local service, Louisiana residential customers may never realize the full benefits of local competition – including lower prices and new innovations – that can be delivered most efficiently, if not only, by facilities-based carriers.

Second, BellSouth attempts to divert the Commission's attention by asserting that it "does not matter that CLECs overall are serving a large number of customers on a resale basis."[12] Although there is nothing in BellSouth's Application that demonstrates that this is the case in Louisiana, BellSouth's theory is correct: the number of customers served on a resale basis is not relevant to determining compliance with Track A.[13] Rather, it is the number of customers – business and residential – that are being served on a facilities basis that is relevant to the Track A inquiry. The fact that the number of residential customers being served by competitors through resale dwarfs the "small number" of customers that are being served on a

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12 BellSouth Brief at 8.

13 However, this figure is certainly relevant to the Commission's checklist and public interest inquiries under Section 271.

facilities basis,[14] does not suggest that the Louisiana market has been opened to "more extensive and varied competition", as BellSouth submits. The fact that the number of residential customers served on a facilities basis is at or near zero demonstrates that a BellSouth-built barrier continues to prevent competitors from entering that market.[15]

Third, BellSouth asserts that "the total number of customers served by Track A CLECs . . . is not relevant to determining BellSouth's compliance with Track A."[16] Again, e.spire believes that this statement is unfounded. To be sure, the Commission has refrained from requiring that a new entrant serve a specific market share in the BOC's service area to be considered a "competing provider".[17] However, as discussed above, the Commission also has recognized that there "may be situations where a new entrant may have a commercial presence that is so small" that it cannot be considered a "competing provider" under Track A.[18]

In sum, BellSouth has not demonstrated that residential customers in Louisiana can choose to switch to a competing facilities-based provider. Its attempts to maneuver around this

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14 It is difficult to determine whether BellSouth's application relies on the "small number" of residential customers it claims KMC is serving on a facilities basis or whether it relies on the argument that Track A simply does not require that residential customers have an actual facilities-based alternative to BellSouth. This "if not this, how about this" style of argument strongly suggests that BellSouth itself recognizes that it cannot meet its burden of demonstrating Track A compliance at this time.

15 Demonstrating the staggering information, personnel and financial resources that are available only to the incumbent monopoly providers, BellSouth has prepared studies that show that there are millions of dollars of *BellSouth* residential revenue within 3,000 feet of e.spire's network. However, BellSouth's current ULL pricing policies make that distance insurmountable. e.spire would be required to lose money to serve these customers, if, given the rudimentary OSS currently available from BellSouth and the subpar state of BellSouth unbundled loop provisioning, it could even retain them.

16 BellSouth Brief at 9.

17 *Ameritech Michigan Order* ¶ 77.

18 *See id.*

requirement and to blame its competitors for focusing their attention on business customers fall well short of overcoming this deficiency. If conditions in the local market are such that no competitor can adopt a viable business plan to provide facilities-based service to residential customers – despite having built networks that, through the use of ULLs could reach substantial *BellSouth* residential revenue – BellSouth simply has not opened its market in a way that satisfies Track A. Only BellSouth – given its ubiquitous network and other advantages of incumbency – can serve these customers profitability.

B. PCS Has Not Developed Into a Substitute for Wireline Local Exchange Service

In tacit recognition that it cannot yet satisfy the requirements of Track A based on the alleged activities of six competing wireline carriers, BellSouth resubmits a little changed version of its argument that it "is eligible for Track A relief based on the existence of PCS carriers in Louisiana."[19] The Commission offered guidance on the issues raised by this claim in its first *BellSouth Louisiana Order* only six months ago. Although the Commission agreed with BellSouth that a PCS provider could qualify as a facilities-based "competing provider" for the purposes of Track A compliance,[20] the Commission again noted that "the use of the term 'competing provider' suggests that there must be 'an actual commercial alternative to the BOC.'"[21] The Commission also noted that it had not found PCS providers to be actual

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19 BellSouth Brief at 9.

20 e.spire respectfully disagrees with this conclusion and reserves the right to brief this issue if an appeal becomes necessary in this proceeding.

21 *In the Matter of Application by BellSouth Corp., et al. Pursuant to Section 271 of the Telecommunications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Louisiana,* 13 FCC Rcd 6245 (1998), ¶ 73 (citing *SBC Oklahoma Order* ¶ 14; *Ameritech Michigan Order* ¶ 75) [hereinafter *"BellSouth Louisiana Order"*].

commercial alternatives to wireline services when it examined the issue in other contexts, but instead found that PCS providers "are still in the process of making the transition 'from a complementary telecommunications service to a competitive equivalent to wireline services.'"[22]

e.spire respectfully submits that BellSouth has offered no evidence to demonstrate that the transition of PCS from a complementary service to a competitive alternative is complete. Indeed, it is difficult to make any conclusions from BellSouth's M/A/R/C Study other than that the numbers – in terms of PCS subscribers and in terms of the percentage of PCS subscribers that have in some form opted for PCS over a different wireline offering – are exceedingly small. For example, BellSouth's study purports to show that within the small subset of PCS subscribers in Louisiana, four percent of "personal users" subscribed to PCS instead of a wireline offering "when initiating service".[23] What this means in terms of BellSouth *residential* subscribers *switching* their service to PCS providers is anything but clear. This ambiguity is underscored by the fact that BellSouth comes up with a different figure – five percent of PCS customers – that have eliminated wireline service and replaced it with PCS. Again, this figure provides no information as to the number of BellSouth subscribers – business and residential – that have switched from BellSouth to a PCS provider for the provision of local services. BellSouth's additional claim that "[a]t today's prices, as many as 7 to 15 percent of BellSouth's local residential customers in New Orleans *could* consider switching to PCS PrimeCo on price

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22 *Id.* (citing *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Radio Services,* FCC 97-75, Second Report, WT 97-14 at 55-56 (rel. Mar. 25, 1997); *Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries,* File No. NSD-L-96-10, FCC 97-286 ¶ 90 (rel. Aug. 14, 1997)).

23 BellSouth Brief at 12-13.

grounds alone" only serves to underscore that PCS has yet to develop into an actual substitute for BellSouth's wireline services.[24]

BellSouth's reliance on a PCIA advertising slogan and AT&T's "Digital One Rate" advertisements in New York also fail to lend support to its argument that PCS has developed into an actual competitive alternative to BellSouth's wireline local services in Louisiana.[25] Although BellSouth is quite vague with respect to the AT&T plan, even BellSouth's edited *approximate* rate range of 11 to 15 cents per minute suggests that the service is not rated in a way that makes it a competitive substitute for local wireline service. Moreover, BellSouth fails to mention substantial minimum monthly service fees and contract terms that may apply.

In sum, BellSouth's reliance on PCS providers cannot satisfy the requirements of Track A. At this time, PCS remains a telecommunications service that is complementary to and not generally a substitute for wireline local services.

II. BELLSOUTH'S UNE RATES DO NOT COMPLY WITH THE COST-BASED PRICING REQUIREMENT OF SECTION 252(d) AND PREVENT BELLSOUTH FROM DEMONSTRATING COMPLIANCE WITH SECTIONS 271(c)(2)(B)(i) AND (ii)

As e.spire stated in its opposition to and reply comments on BellSouth's First Louisiana Section 271 Application, BellSouth's rates for interconnection and UNEs are not cost-based and, as such, are not in compliance with the cost-based pricing requirement of Section 252(d)(1).[26] Because the competitive checklist explicitly requires:

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24 *Id.* at 14 (emphasis added).

25 *Id.* at 12.

26 *See, e.g.,* ACSI Opposition, CC Docket No. 97-231 (BellSouth Louisiana), at 12.

> (i) Interconnection in accordance with the requirements of sections 251(c)(2) and *252(d)(1)*.[27]

and

> (ii) Nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and *252(d)(1)*,[28]

the Commission cannot grant BellSouth's application without making an affirmative finding that BellSouth's prices comply with the cost-based pricing requirement of Section 252(d)(2).

While e.spire recognizes that the Commission currently may be hamstrung by the jurisdictional debate surrounding its pricing rules and decisions, e.spire respectfully submits that Section 271 gives the FCC the exclusive authority to determine compliance with the competitive checklist and, accordingly, does not permit it to give rubber-stamp approval to the determination of the LPSC on this matter.

With regard to the LPSC's review of BellSouth's cost studies and pricing levels, e.spire's position has been well documented not only in its opposition to and reply comments on BellSouth's First Louisiana Section 271 Application, but also in its LPSC pleadings and testimony, and in its appeal of the LPSC's decision in its costing docket.[29] e.spire summarizes the positions taken in these filings below. e.spire also respectfully submits that, if the Commission does nothing else on the issue of cost-based pricing, it must not grant approval of

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27 47 U.S.C. § 271(c)(2)(B)(i) (emphasis added).

28 *Id.* § 271(c)(2)(B)(ii) (emphasis added).

29 *American Communication Services of Louisiana, Inc., et al. v. BellSouth Telecommunications, et al.*, Civil Action No. 98-105-A-M1 (complaint filed in the U.S. District Court for the Middle District of Louisiana on Feb. 5, 1998).

BellSouth's instant application until the pending appeal of the Louisiana costing docket has been resolved.

A. The LPSC's Failure to Require Cost-Based and Geographically Deaveraged Pricing for ULLs Does Not Relieve BellSouth of Its Obligation to Demonstrate Compliance With Sections 271(c)(2)(B)(i) and (ii)

Much has been said about the importance of proper pricing for interconnection and UNEs. For example, in its evaluation of BellSouth's First Louisiana Section 271 Application, DOJ concluded that "[c]ompetition through the use of [UNEs] will be seriously constrained, and may even be impossible, if those elements are not available at appropriate prices."[30] As discussed in e.spire's opposition to and reply comments on BellSouth's First Louisiana Section 271 Application, as well as in its appeal of the LPSC's decision in its costing docket, BellSouth has never demonstrated, nor has the LPSC ever fully explained, how BellSouth's rates comply with the cost-based pricing requirement of Section 252(d)(1). The mere labeling of rates as "cost-based" does not make them so.

BellSouth's current UNE rates are based on cost studies that reflect the position taken by BellSouth in the Louisiana cost docket that "it should be allowed to recover its actual, or embedded, costs."[31] Some rates bear no relation to cost at all. Thus, e.spire submits that BellSouth's interconnection and UNE rates do not comply with the pricing requirements of Section 252(d)(1). Although the LPSC professed to adopt a forward-looking cost methodology akin to that adopted by the Michigan PSC, it made no detectable attempt to apply it. Indeed, the

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30 DOJ Evaluation, CC Docket No. 97-231 (BellSouth Louisiana), at 21.

31 *In re: Review and Consideration of BellSouth Telecommunications, Inc.'s TSLRIC and LRIC Cost Studies . . .*, Louisiana PSC Docket no. U-22022, *In re: Review and*

(continued...)

LPSC gave its staff and consultant insufficient time to discern whether the cost studies submitted and prices proposed by BellSouth were based on forward-looking costs and, without explanation, it overruled its Chief ALJ's attempt to address the shortcomings that resulted.

e.spire and other competitors have appealed the LPSC's cost decision. The following excerpts from e.spire's complaint demonstrate that, at the very least, it cannot be assumed that the UNE rates established by the LPSC comply with the cost-based pricing requirement of Section 252(d)(1).

> 35. On August 1, 1997, the [LPSC] rescheduled the Costing Docket giving only 90 days to review and analyze BellSouth's cost studies, conduct discovery, present evidence, hold a hearing and have the ALJ issue a recommendation.
>
> 38. On a number of occasions, and under oath, the Commission's expert witness, Kim Dismukes, admitted that she did not have sufficient time to analyze many rates proposed by BellSouth, and therefore she was required to simply accept many of BellSouth's assumptions.
>
> 52. During an Open Session of the [LPSC's] monthly Business and Executive meeting, held October 22, 1997, the [LPSC] staff's counsel admitted the following:
>
> > "[T]he intervenors and the ALJ have raised legitimate concerns with regard to the timing on certain issues . . . [W]e spent more time on certain issues and less time on other issues and where we did not spend a significant amount of time, the staff used BellSouth's numbers as a default, meaning we didn't say they were good or we didn't say they were bad. We just said, we don't have time to do an in depth analysis of what these numbers are. We're going to go with them."
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> 54. During the [LPSC's] October 22, 1997 Open Session, [e.spire], through counsel, attempted to address concerns about the rates and the lack of time

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(...continued)
Consideration of BellSouth Telecommunications, Inc.'s Tariff. . . , Louisiana PSC Docket No. U-22093, *Final Recommendation*, at 18 (Oct. 17, 1997).

for appropriate analysis to be conducted. Although [e.spire's] counsel stood to be recognized she was not given the opportunity to be heard. Specifically, Commission President, Don Owen, stated:

> "Okay. I think we ought to cut off the discussion, because obviously we could argue this for a long time."

60. . . . The rates approved by the [LPSC] are far in excess of those paid by BellSouth customers as well as those negotiated between [e.spire] and BellSouth and included in the [e.spire/BellSouth] Interconnection Agreement. BellSouth customers pay less for the entire service than [e.spire] pays just for the unbundled loop . . . .

64. Rather than include all features at one price as that included in the [e.spire]/BellSouth Interconnection Agreement, BellSouth's SL1/SL2 [ULL pricing] proposal [adopted by the LPSC] requires that those standard features be purchased separately at a premium price. Critically, . . . [a 5 minute ULL cutover] cannot be obtained at any price . . . .

67. To the best of [e.spire's] knowledge and belief, the rate adopted by the [LPSC] for a simple 2-wire ULL exceeds the rate charged by a BOC for similar facilities in *any* other state.

71. . . . [T]he level of service agreed to in the [e.spire]/BellSouth Interconnection Agreement cannot be obtained at any price . . . . To obtain a service similar, but still inferior, to the service offered by BellSouth to its end users . . . a CLEC must pay approximately $100.00 more than a BellSouth end user.

72-73. . . . In the [e.spire]/BellSouth Interconnection Agreement, there is no surcharge for [the] basic customer courtesy of cutting-over at an appointed time. This service, once included in [e.spire's] basic NRC, now costs $32.77 over and above the basic NRC.

74-75. [In the e.spire/BellSouth Interconnection Agreement, BellSouth agreed to 5 minute cutover intervals. The basic NRC for loop cutovers adopted by the LPSC includes a *one hour* cutover per order. That is, a customer seeking to switch from BellSouth to e.spire could be without phone service for a full hour. BellSouth offers a 15 minute cutover interval as a premium service for which the LPSC, without discussion, approved an NRC of $43.67. BellSouth does not offer and the LPSC did not establish an NRC for a 5 minute cutover interval.]

76-77. [The LPSC adopted an NRC of $32.52 for the cross-connect – an amount that is approximately $12.00 higher than the amount agreed to in the e.spire/BellSouth Interconnection Agreement. BellSouth imposes no similar charges on its own end users.]

89. Added together, the [LPSC]-approved NRCs required to install a single two-wire analog ULL amount to *$180.83*. . . . This compares to the total NRCs charged by BellSouth to its end users of approximately $85.00 per line.

97. When[e.spire] and BellSouth negotiated the [e.spire]/BellSouth Interconnection Agreement, they agreed to an NRC rate that would be eighty percent (80%) of the NRC paid by BellSouth end users. This percentage was reached in recognition of the fact that there is less work [involved] for BellSouth to cutover a loop to a CLEC customer than there is to provide full service to its own end users. Clearly, BellSouth would not agree to rates below its own costs.

99. Without full analysis and without explanation, the Commission adopted a total NRC of $180.83 – or approximately $100.00 more than the amount agreed to in the [e.spire]/BellSouth Interconnection Agreement [for an inferior level of service].

112. The [LPSC's] failure to deaverage UNE rates greatly exacerbates the anticompetitive effect of adopting BellSouth's [ ] non-cost-based UNE rates. For example, while BellSouth is able to quote end user prices in downtown New Orleans based on its low cost to serve customers there, [e.spire] must incorporate BellSouth's much higher statewide average loop costs in its own pricing models. Thus, by failing to deaverage rates for ULLs and UNEs on a geographic basis, the [LPSC] has conferred a significant competitive advantage on BellSouth.

Despite the controversy surrounding BellSouth's UNE rates, BellSouth's Application hardly contains an attempt to demonstrate that its interconnection and UNE rates are cost-based. Based on the foregoing, the Commission simply cannot rely on BellSouth's claim that its interconnection rates are "cost-based as determined by the LPSC."[32] BellSouth does not even address the cost-based pricing issue with respect to its provision of UNEs. In its discussion of

[32] BellSouth Brief at 37.

access to UNEs BellSouth merely claims that it has made physical and virtual collocation available at "PSC-approved prices".[33]

B. BellSouth's Creation of a Residential Cost-Price Squeeze Is Forestalling the Development of Facilities-Based Residential Service Competition

e.spire must purchase ULLs and related facilities from BellSouth to provide facilities-based local exchange services to individual residential customers. While e.spire is able to replace BellSouth's interoffice transport facilities, tandem switching, local switching and signaling over time, there currently is no economic substitute for the ubiquitous local loop constructed by BellSouth with a century-long monopoly revenue stream. The out-of-pocket cost to e.spire of purchasing ULLs from BellSouth constitutes a direct cost of service to e.spire. In order to provide residential services profitably, e.spire must be able to recoup both the cost of purchasing ULLs from BellSouth and the cost of its own network and overhead in its retail pricing for residential services. At the same time, the market demands that e.spire's retail prices charged to end-users be established at or below the rates charged by BellSouth to end-users for comparable services.[34]

Unfortunately, BellSouth currently demands a price for ULLs and associated facilities that exceeds the corresponding price charged by BellSouth for residential retail local exchange services. Specifically, in order to serve a residential customer, e.spire currently must pay BellSouth $19.35 monthly for a 2-wire loop, plus $0.26 for the cross-connect and $2.29 for

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33 *Id.* at 39, 40.

34 *See In re: Consideration and Review of BellSouth Telecommunications, Inc.'s Preapplication Compliance with Section 271...*, Louisiana PSC Docket No. U-22252, Testimony of Riley M. Murphy, at 7-9 (Apr. 7, 1997) [hereinafter, "Murphy Testimony"].

number portability. *e.spire's per-line out-of-pocket cost to BellSouth is $21.90*, even *before* e.spire pays for collocation and its own network and overhead. When the need to recover NRCs associated with ULLs is taken into account, e.spire's effective monthly out-of-pocket cost per 2-wire loop increases to *$26.98*.[35] By contrast, *BellSouth's retail price for basic residential service in New Orleans, Shreveport and Baton Rouge is only $13.55, $13.45 and $13.55, respectively.*[36] Since e.spire must purchase ULLs from BellSouth at a cost that alone exceeds BellSouth's residential retail rates, neither e.spire nor any other CLEC currently is able to provide facilities-based residential service in Louisiana profitably. Consequently, BellSouth's current ULL pricing creates a cost-price squeeze which constitutes a barrier to entry for potential providers of facilities-based residential services.[37]

To remove this barrier to entry, BellSouth would have to lower its prices for ULLs and related UNEs substantially. Importantly, this dilemma is derivative of the rates proposed *by BellSouth*. There is no reason that such a cost-price squeeze must be a permanent condition of the market. The rates at issue were established *without* reference to TELRIC or any forward-looking costing principles. They also suffer from the fact that the rates apply *statewide*, and are *not deaveraged* to reflect the network efficiencies realized by BellSouth in the urban centers where e.spire competes. Both of these failings can be cured either by BellSouth's voluntary

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35 The applicable interim non-recurring charges total $180.83 per ULL combined. Assuming that customers churn on average every two years, this raises the effective monthly ULL cost to $26.98 [($180.83 NRC divided by 24) + $19.45].

36 *Murphy Testimony*, at 8.

37 By contrast, in mid-1996, Ameritech voluntarily offered ULL rates in the $9.00 range in Michigan. Brooks Fiber responded by enlisting more than 5,000 residential access lines in less than a year. *See Ameritech Michigan Order* ¶ 65.